IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 19TH DECEMBER 2006 / 28TH AGRAHAYANA 1928

WP(C).No. 33630 of 2006(C)

OS.196/2006 of M.C.,PARAPPANANGADI

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PETITIONER:

THARBIYYATHUL ISLAM SANGHAM,
CHANGUVETTIKULAM,REG.NO.186/89, P.O.KOTTAKKAL,
MALAPPURAM DISTRICT,REPRESENTED BY ITS SECRETARY,
C.K.KUNHIMARAKKAR HAJI, S/O.ERAMUTTY, BY HIS
P/AT.HOLDER BEERANKUTTY, S/O.MUHAMMEDKUTTY,KUZHI-
MATTIKKALATHIL(H),PARAPPUR DESOM,MALAPPURAM DIST.

BY ADV. SRI.T.KRISHNAN UNNI

RESPONDENTS:

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1. V.P.AJITHKUMAR, S/O.BALAKRISHNAN
THIRUMULPAD, PANNIYANKARA, KOZHIKODE.

2. THE ASSISTANT EXCISE COMMISSIONER,
MALAPPURAM.

3. THE EXCISE COMMISSIONER,
KERALA STATE, THIRUVANANTHAPURAM.

4. THE CORNICHE HOSPITALITY (P) LTD.,
CHANGUVETTY, P.O.KOTTAKKAL,
MALAPPURAM DISTRICT.

5. CHOORAKKAL IQUABAL,
S/O.MUHAMMED HAJI, CHANGUVETTY,
P.O.KOTTAKKAL, MALAPPURAM DISTRICT.

BY //

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 19/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

W.P.(C) .NO.33630 OF 2006

Dated 19th December 2006

JUDGMENT

Petitioner is plaintiff in O.S.196/06 on the file of Munsiff court, Parappanangadi. Suit was instituted seeking a decree for permanent prohibitory injunction restraining defendants 2 and 3, Assistant Excise Commissioner and Excise Commissioner from issuing any license to run a bar to first respondent in violation of the rules. In the suit petitioner filed I.A.831/06 an application under Order XXXIX Rule 1 of the Code of Civil Procedure seeking an order of temporary injunction till the disposal of the suit restraining issuance of FL-3 license to first respondent to run a bar in the building constructed in the property of first respondent. Under Ext.P6 order learned Munsiff finding that petitioner has no prima facie case dismissed the application. Petitioner challenged that order before Sub court, Tirur in C.M.A.20/06. Learned Sub Judge after hearing the parties, under Ext.P7 order dismissed the appeal

confirming Ext.P6 order. This petition is filed under Article 227 of Constitution of India challenging Exts.P6 and P7 orders contending that courts below did not properly consider the case at all and learned Sub Judge did not confirm the finding of the learned Munsiff in Ext.P6 and dismissed appeal holding that petitioner has an alternative remedy provided under the Act and therefore petitioner is entitled to an order of temporary injunction.

2. Learned counsel appearing for petitioner and learned Senior counsel appearing for first respondent and Government pleader were heard.

3. Learned counsel appearing for petitioner vehemently argued that the very case of the petitioner is that there is a 'niskarapalli' in the plaint B schedule property and it is not a 'imambra' as stated by learned Munsiff in Ext.P6 order and 'niskarapalli' is a mosque and the hotel constructed by first respondent is within the prohibited distance from the mosque for which a license cannot be granted as provided under the Foreign Liquor Rules and no license could be granted in violation of the Rule 13 (3) of the Foreign Liquor Rules and this aspect was not properly considered by learned

Munsiff and finding of the learned Munsiff that suit is pre-mature and is bad for want of notice under Section 80 of the Code of Civil Procedure is unsustainable. Learned counsel further argued that learned Sub Judge did not concur with those findings of learned Munsiff in Ext.P6 order and dismissed the appeal finding that petitioner has got alternative remedy under Kerala Abkari Act and therefore petitioner is not entitled to an order of temporary injunction and that finding is perverse. Relying Rule 13(3) of Foreign Liquor Rules learned counsel argued that no license could be granted in violation of the said rule if within 200 metres from the hotel there is a mosque and report submitted by the Commissioner establish that the hotel is within the prohibited area and therefore an order of temporary injunction should have been granted. Relying on the decisions of this court in **Saina & others v. Konderi & others (1984 KLT 428) and Mariamma v. Thomas (2003 (1) KLT 245)** learned counsel argued that plaintiff is entitled to file a suit restraining the issuance of a license in violation of the provisions of Foreign Liquor Rules and finding that suit is pre-mature and petitioner is not entitled to the order of injunction are perverse

and are to be set aside. Learned counsel also argued that no irreparable injury would be caused by granting an order of injunction as first respondent can run the Three Star hotel except a bar and balance of convenience is also in favour of petitioner and therefore exercising the extra ordinary jurisdiction of this court under Article 227 of Constitution of India orders are to be quashed and an order of temporary injunction is to be granted.

4. Learned Senior counsel appearing for respondents 1 and 4 argued that petitioner is claiming right under Ext.A1 deed which was executed only on 21/3/2006 and disputed structure in the B schedule property itself was constructed only thereafter and Ext.A1 was created and structure was erected without bonafide and with the malafide intention of preventing respondents 1 and 4 from starting a bar in the three Star hotel and they are not entitled to get any equitable relief and therefore the order passed by the courts below may not be interfered in exercise of the extra ordinary jurisdiction of this court.

5. Petitioner instituted the suit seeking a decree for permanent prohibitory injunction on the strength of Ext.A1, which came into existence only on

21/3/2006. Fact that first respondent has started construction of a three Star hotel in 2005 itself is not disputed. The construction was over and Hotel Ridges Inn started functioning therein as is clear from the statements in the writ petition. Under Ext.A1, B schedule property was given for the purpose of constructing a 'niskarapalli'. Admittedly no mosque or 'niskarapalli' was in existence in the plaint B schedule property prior to 21/3/2006 or at the time when respondents 1 and 4 started construction of Three Star hotel. Structure in the plaint B schedule property was admittedly constructed subsequent to 21/3/2006. Learned Munsiff found that petitioner has no prima facie case and is not entitled to an order of temporary injunction. Though for different reasons learned Sub Judge also found that petitioner is not entitled to an order of temporary injunction. Question is whether in exercise of the extra ordinary jurisdiction of this court those orders are to be interfered with and an order of temporary injunction till the disposal of the suit is to be granted.

6. True, there is force in the argument of learned counsel appearing for petitioner that learned

Munsiff has mistakenly taken that the case of the petitioner that the structure in the plaint B schedule property is 'imambra'. It was the specific case of petitioner in the plaint and through out that the structure is a 'niskarapalli' . There is also force in the argument of learned counsel appearing for petitioner that the bar for issuing license under Rule 13(3) of Foreign Liquor Rules within the prohibited distance of 200 metres, is applicable in respect of three Star hotel building to be started subsequent to the coming into force of the said rule. Finding of learned Munsiff that Rule do not apply to the Three Star hotel is not correct. There is also force in the argument of learned counsel appearing for petitioner that a plaintiff is entitled to institute a suit and seek an order of temporary injunction if there is reasonable apprehension. It is also equally correct that a suit can be instituted, if constructions are made in violation of the Building or Municipal rules as held this court court in Saina & others' case (supra) and Mariamma's case (supra). It is also true that alternative remedies stated by the Sub Judge are not really alternative remedies available to the petitioner. But the crucial

question is whether exercising the extra ordinary jurisdiction of this court relief sought for is to be granted on the facts and circumstances of this case.

7. Rule 13 (3) of Foreign Liquor Rules provides that no license shall be issued to hotels or restaurants which are located within 200 metres from an educational institution, temple, church, mosque or burial ground. Mosque has been defined under the rule as a public place where prayer is offered by the muslims. 'Imambra' is described by Mulla in Mahomedan Law as "an apartment in a private house or a building set apart like a private chapel for religious purposes. Intended for the use of the owner and members of his family, though the public may be admitted with the permission of the owner." Varma in Ismamic Law (Personal) described 'imambra' as an apartment in a private house or a building set apart for private religious purposes. Ext.A1 shows that the property was given not for construction of 'imambra' and as described earlier but for constructing a 'niskarapalli' which could only be a mosque as defined under the Foreign Liquor Rules. It is also not disputed that the distance from

the three Star Hotel to B schedule property is far less than the prohibited distance under Rule 13(3). But the question is whether on that ground petitioner is entitled to an order of injunction either restraining respondents 2 and 3 from granting a license.

8. Admitted facts reveal that first respondent started construction of a three Star hotel in 2005 itself. Ext.A1 was created on 21/3/2006 just before the completion or after completion of the construction of the Hotel. As pointed out by learned counsel appearing for respondents 1 and 2 the bona fide of creating Ext.A1 is doubtful. By constructing a mosque or a temple or educational institution, near to a building intended for starting a three star hotel, which is about to be completed, whether a person is entitled to contend that no FL-3 license could be granted under Foreign Liquor Rules as it violates Rule 13(3) of Foreign Liquor Rules is a relevant question which cannot be slightly brushed away such an objection is to be sustained, any unscrupulous neighbour and the rival bar owner can purchase a nearby property or persuade its owner to create a Wakf like Ext.A1 in this case and put up a makeshift structure like temple or a church or a mosque or a burial ground and then claim protection

provided under Foreign Liquor Rule. It is doubtful whether such protection could be granted. That exactly is the position herein. When first respondent started construction of the building there was admittedly no mosque or 'niskarapalli' within the prohibited area. Ext.A1 itself was created on a much later period evidently with the sole intention of proclaiming that 'niskarapalli' is to be constructed. Admittedly Ext.A1 wakf is not registered with the Kerala Wakf Act. In spite of the Manual of Guidelines to prevent and Control Communal Disturbances and to Promote Communal Harmony issued by the State of Kerala which prohibits construction of religious place without the approval of District authorities, no sanction was obtained for construction of the 'niskarapalli'. On the facts of this case, I do not find that in such circumstances this court has to grant an order in favour of petitioner prohibiting respondents 2 and 3 from exercising the power available to them in the Foreign Liquor Rules as prima facie the very purpose of execution of Ext.A1 appears to be without bonafides. As pointed out by the learned Government Pleader respondents 2 and 3 have not decided to grant the license. It is for them to consider

whether first respondent is entitled to a license in view of Sub Rule 3 of Rule 13 of Foreign Liquor Rules. In such circumstances, I do not find any reason to interfere with Exts.P6 or P7 orders as petitioner did not succeed to prove a prima facie case to grant an order in his favour. Learned Munsiff to decide the suit on the evidence untrammelled by any observation in Exts.P6 and P7 orders or in this judgment. It is made clear that as leave has been obtained by petitioner under Section 80(2) of Code of Civil Procedure the suit is not bad for want of notice under Section 80(1) of C.P.C. The suit is not barred because of any alternative remedy available.

Writ petition is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.